

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4) MUR 4643
5 Democratic Party of New Mexico)
6 Judy Baker, as Treasurer)
7
8

9 **GENERAL COUNSEL'S BRIEF**

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11 **I. STATEMENT OF THE CASE**

12 MUR 4643 involves an examination of disbursements made during a special election
13 period in the spring of 1997, by the Democratic Party of New Mexico ("DPNM") on behalf of a
14 Democratic congressional candidate, Eric Serna, and the Friends of Eric Serna for Congress
15 committee ("Serna campaign"). The Federal Election Commission ("Commission") found
16 reason to believe that the Democratic Party of New Mexico-Federal and its treasurer violated
17 2 U.S.C. §§ 434(b), 441a(a)(2)(A), 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i); and the
18 Democratic Party of New Mexico-Non-Federal (State) and its treasurer violated 2 U.S.C. § 441b
19 and 11 C.F.R. § 102.5(a)(1)(i).

20 Based on answers to interrogatories, depositions and documents provided pursuant to
21 Commission subpoenas, this Office has determined that the Democratic Party of New Mexico
22 and the Serna campaign had regular communications during the special election period from
23 March 1, 1997, to May 13, 1997, including discussions of state Party budgeting, planning, voter
24 drive and get-out-the-vote (GOTV) efforts. The Democratic Party of New Mexico reported
25 making numerous disbursements totaling approximately \$202,000 for candidate-specific
26 absentee ballot applications and voter identification/GOTV efforts, and the Party used 86% non-
27 Federal dollars (approximately \$173,800) in making these disbursements. The DPNM
28 disbursements associated with these activities are.

Name	Reported Purpose of Disbursement	Date	Total Amount
Ink Impressions	Printing	4/3/97	\$1,624 66
Inter-Tel	Phones	4/3/97	\$168 62
The Tyson Organization	Phone Bank, Voter Polling	4/14/97	\$5,000 00
Randy Dukes	Re-imb. Canvassing, field expenses	4/14/97	\$1,000 00
Tom Eisenhauer	Consulting	4/14/97	\$4,793 00
Ink Impressions	Absentee ballot applications	4/16/97	\$1,624 66
The Tyson Organization	Phoning	4/16/97	\$24,395 00
Armando Gutierrez	Radio Ads, GOTV Spanish & Navajo Translations	4/18/97	\$100 00
KLVO Radio	Generic Voter Drive Ad	4/24/97	\$475 02
KABZ-AM Radio	Generic Voter Drive Ad	4/24/97	\$1,330 06
KXKS Radio	Generic Voter Drive Ad	4/24/97	\$1,064 05
KEXT-FM Radio	Generic Voter Drive Ad	4/24/97	\$665 03
KALY Radio	Generic Voter Drive Ad	4/24/97	\$1,064.05
KNMX Radio	Generic Voter Drive Ad	4/24/97	\$574 43
KDCE Radio	Generic Voter Drive Ad	4/24/97	\$1,092 67
KFUN-AM/KLVF-FM	Generic Voter Drive Ad	4/24/97	\$446.78
KSWV Radio	Generic Voter Drive Ad	4/24/97	\$1,339 07
KXTC Radio	Generic Voter Drive Ad	4/24/97	\$152.91
KGLX Radio	Generic Voter Drive Ad	4/24/97	\$1,189 30
Mellennium Radio	Generic Voter Drive Ad	4/24/97	\$134 94
Mellennium Radio	Generic Voter Drive Ad	4/24/97	\$1,448 56
KNDN Radio	Generic Voter Drive Ad	4/24/97	\$1,423 83
KGAK Radio	Generic Voter Drive Ad	4/24/97	\$1,444 15
KTNN Radio	Generic Voter Drive Ad	4/24/97	\$760 00
KGLX Radio	Generic Voter Drive Ad	4/24/97	\$1,189 30
KXTV Radio	Generic Voter Drive Ad	4/24/97	\$1,019 40
Mellennium Radio	Generic Voter Drive Ad	4/24/97	\$517 35
Randy Dukes	Field Expenses, Canvassing, Generic	4/24/97	\$5,000 00
American Data Mgmt	Walk/Phone Lists	4/24/97	\$2,570 81
Diversified Printing, Inc	Printing, Door Hangers, Generic	4/28/97	\$7,318 29
US Postmaster	Postage	4/28/97	\$1,200 00
The Tyson Organization	Phone Banks, Vote Early, Vote by Mail, Generic	4/28/97	\$24,075 00
Statewide Information	Voter Lists, Labels	5/2/97	\$6,189 26
Randy Dukes	Re-imb Voter Canvassing, Generic	5/2/97	\$5,000 00

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K-VIVA Radio	Voter Drive, Ad, Generic	5/2/97	\$574 75
US Postmaster	Postage	5/2/97	\$3,100 00
Statewide Information	Voter Lists, Labels	5/2/97	\$757 20
American Data Mgmt	Vote by Mail, Early Vote, Postcards	5/2/97	\$6,798 00
The Tyson Organization	Phone Banks, Vote Early, Vote by Mail, Generic	5/2/97	\$18,472.91
Randy Dukes	Field Expenses, Canvassing, Generic	5/2/97	\$5,000 00
Randy Dukes	Field Expenses, Canvassing, Generic	5/5/97	\$7,000 00
The Target Group	Phoning, Voter Contact, Generic	5/8/97	\$2,500 00
KGAK Radio	Voter Drive, Ad, Generic	5/8/97	\$220 87
Randy Dukes	Field Expenses, Canvassing, Generic	5/8/97	\$7,000 00
KNDN Radio	Voter Drive, Ad, Generic	5/8/97	\$139 84
KXTC Radio	Voter Drive, Ad, Generic	5/9/97	\$129 46
General Printing Service	Printing Flyers, Polling Places, Generic	5/9/97	\$609 43
Randy Dukes	Field Expenses, Canvassing, Generic	5/9/97	\$7,000 00
Diversified Printing, Inc	Printing, Door Hangers, Generic	5/9/97	\$2,040 42
The Tyson Organization	Phone Banks, Vote Early, Vote by Mail, Generic	5/12/97	\$18,712.91
Randy Dukes	Field Expenses, Canvassing, Generic	5/12/97	\$5,000 00
Armando Gutierrez	Radio Ad, Generic	5/12/97	\$158 34
Statewide Information	Voter File, Lists, Labels	5/12/97	\$3,506 45
Randy Dukes	Re-imb personal expenses	5/15/97	\$836 00
MasterCard	Payment Charges, travel and lodging, Randy Dukes	5/15/97	\$3,705 68
The Target Group	Phoning, Voter Contact, Generic	??	\$1,531 60

Total \$202,184 06

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2 Additionally, the DPNM reported coordinated expenditures of \$15,127 on behalf of Eric
3 Serna for the 1997 Special Election out of a possible \$31,810 coordinated expenditure limit
4 Thus, the DPNM could have reported only an additional \$16,683 in coordinated expenditures
5 during the 1997 Special Election, placing the DPNM \$185,501.06 over the limits of
6 2 U.S.C § 441a(d). Accordingly, this Office is prepared to recommend that the Commission

1 find probable cause to believe that the Democratic Party of New Mexico-Federal and its treasurer
2 violated 2 U.S.C. §§ 434(b), 441a(a)(2)(A), 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i); and
3 that the Democratic Party of New Mexico-Non-Federal (State) its treasurer violated 2 U.S.C.
4 § 441b and 11 C.F.R. § 102.5(a)(1)(i).

5 By examining the relationships between key players of the DPNM and the Serna
6 campaign during the 1997 special election period in New Mexico, this Office will show how the
7 DPNM and the Serna campaign shared just enough information about how each campaign was
8 progressing to maximize the resources of both entities, and so that the DPNM could fill in and
9 provide help for the Serna campaign where necessary, including what the DPNM calls voter
10 drive and generic get-out-the-vote (GOTV) activities.

11 **II. ANALYSES**

12 **A. COORDINATION**

13 **Law.** The Federal Election Campaign Act of 1971, as amended (“the Act”) and Federal
14 Election Commission (“Commission”) regulations provide limits and prohibitions on
15 contributions that individuals, corporations, committees and other entities may make to
16 candidates and their committees. *See* 2 U.S.C. §§ 441a, 441b, 441c, 441e, 441f, 441g; 11 C.F.R.
17 parts 100, 110, 114 and 115. A “contribution” includes “any gift, subscription, loan,
18 advance,...or anything of value made by any person for the purpose of influencing any election
19 for Federal office....” 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.7(a)(1). “Anything of value”
20 includes in-kind contributions. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A).
21 “[E]xpenditures made by any person in cooperation, consultation or concert, with, or at the
22 request or suggestion of, a candidate, his authorized political committees, or their agents, shall be
23 considered to be a contribution to such candidate ” 2 U.S.C. § 441a(a)(7)(B)(i). “[C]ontrolled or

1 coordinated expenditures are treated as contributions” under the Act. *Buckley v Valeo*, 424 U.S.
2 1, 46 (1976). “There is no significant functional difference between a party’s coordinated
3 expenditure and a direct party contribution to the candidate.” *Federal Election Commission v.*
4 *Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 121 S.Ct. 2351, 2371 (2001).
5 Political committees may not make or accept contributions which exceed the Act’s limits under
6 section 441a or which are prohibited by section 441b(a). *Id.*, 2 U.S.C. § 441a(f). Such limits on
7 contributions include coordinated expenditures by a state committee in connection with the
8 general election campaign for the United States House of Representatives in that State.
9 2 U.S.C. § 441a(d)(3)(B). In New Mexico’s Third Congressional District the limit for party
10 coordinated expenditures for the 1997 special election was \$31,810. A party committee has an
11 obligation to report any coordinated expenditures as contributions, along with the date and the
12 amount of each contribution. 2 U.S.C. § 434(b)(4)(H)(iv) and (6)(B)(iv).

13 **Overview of the Campaign.** The 1997 Special Election in New Mexico, in which Eric
14 Serna ran as a candidate, was a three-month campaign, and the only election in the entire state
15 that calendar year. The Democratic Party of New Mexico reported over 83% of its
16 disbursements in 1997 during the special election period. Thus, clearly, the bulk of money
17 expended by the Party in 1997 focused on the special election to benefit Eric Serna in his
18 campaign.

19 During the campaign period, a steady flow of information passed between the candidate’s
20 campaign and the Party. Tom Carroll, the Serna campaign manager, admits telling the state Party
21 what the Serna campaign was doing, how much money they had, where their weaknesses were,
22 and so forth. Likewise, Randy Dukes, the key person with the Party, admits providing the Serna
23 campaign with a copy of the Party program plan, which included projections for the timing, cost

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1 and intended audience of some radio and press, absentee ballot application packages and other
2 get-out-the-vote ("GOTV") activity. Through a flow of information between key Party and Serna
3 campaign personnel, the Party discerned what the candidate needed, and then filled in with
4 assistance where needed. Also, some consultants and operatives overlapped with both the Party
5 and the Serna campaign, including Randy Dukes and the Tyson Organization.

6 As this Brief will demonstrate, the Serna campaign and the Party worked together in
7 cooperation and in concert with each other, and the Serna campaign consulted the Party on
8 various aspects of the campaign. Discussions between the Party and candidate's committee
9 amounted to control by the Serna committee over the contents, timing, location, mode or
10 intended audience, or volume of communications by the Party. These communications served as
11 a means for the Serna campaign to coordinate their campaign with the Party by letting the Party
12 know what the Serna campaign had and did not have, in order to target limited resources for the
13 benefit of the Serna campaign.

14 **Randy Dukes' dual role.** During the 1997 special election period, Randy Dukes served
15 as a key person both in the Democratic Party of New Mexico and the Friends of Eric Serna
16 campaign.

17 Though Randy Dukes was not on the Serna campaign's payroll, he had a desk in the
18 Serna campaign office and worked at that office daily. Carroll deposition transcript, pp. 125-128.
19 Dukes did not travel. He was a core field operations person, there everyday full time. Carroll
20 deposition transcript, pp. 136-137, 140. Dukes helped the Serna campaign with targeting the
21 field in general and worked with all of the people in the field (e g , lawn signs, street signs, etc.)
22 Dukes attended Serna campaign staff meetings. Carroll deposition transcript, p 128

1 The DPNM lists Dukes in their disclosure reports as "DPNM staff", and notes that Dukes
 2 expended almost all of the DPNM's reported coordinated expenditures on behalf of the Serna
 3 campaign.¹ Dukes' duties for the Party during the campaign focused on get-out-the-vote
 4 (GOTV) activities. Randy Dukes is a solid political field operative, according to Jerry Tyson of
 5 the Tyson Organization.² Mr. Dukes himself has admitted that he communicated regularly with
 6 key persons associated with the Serna committee and the Party. His communications with both
 7 entities included discussions of state party budgeting, planning and GOTV efforts, and a
 8 "Democratic Party program summary." Dukes deposition transcript, pp. 165-166, 174-175, and
 9 251-262.

10 This "Democratic Party Program Summary" found in the files of DPNM included
 11 detailed information about various proposed activities of the Democratic Party of New Mexico
 12 for the 1997 special election, including radio ads, proposed time frames for such activities and
 13 estimated costs of each item. Randy Dukes admits that he created this program summary.
 14 Dukes deposition transcript, p. 172. This Party program summary contains a fax-sent line
 15 reading "E. Serna" and a phone number determined by this Office to be the fax line for the
 16 Friends of Eric Serna campaign. The Serna campaign also had this identical fax number listed on
 17 their website. The faxed date was March 31, 1997, about one month after Eric Serna was chosen

¹ See, e.g., the Democratic Party of New Mexico's 1997 30 day post-special election report, Schedule A, Itemized Receipts

² The Tyson Organization was a vendor for both the Democratic Party of New Mexico and the Serna campaign. Additionally, the Tyson Organization has close ties to Randy Dukes. Mr. Dukes' wife, Rainey Dukes, was an employee of the Tyson Organization during the special election, and she worked with him during that election. In fact, numerous facsimile transmissions were sent between them for services performed by The Tyson Organization. According to John Angle, Executive Director of Tyson organization, the Tyson Organization had an informal, verbal agreement with the Democratic Party of New Mexico and a separate agreement with the Serna campaign. The Tyson organization was involved in phone banks for the Party and the Serna campaign.

1 to be the Democratic candidate for Congress, and about six weeks prior to the special election.
2 The program summary contains handwritten notes on the left margin and at the bottom of the
3 first page (e.g., 20,000, 40,000, and at the bottom of the page showing what appears to be a total,
4 \$250,608), and time period (e.g., first two weeks) next to certain campaign activities, including
5 notations for "Hispanic/Native American radio and press" and "Absentee Ballot Program." No
6 one deposed or interviewed by this Office claims to recognize the handwriting on the program
7 summary; however, since this document was faxed from the Serna campaign, either the Serna
8 campaign added the handwriting or the DPNM included it. The later pages in the faxed
9 Democratic Party program summary detail the same information as the handwriting, thereby
10 suggesting that the Serna campaign approved the proposed program summary with time frames
11 and costs and writing them in and sending the program back.

12 **Tom Carroll, Serna campaign manager.** Tom Carroll was Eric Serna's campaign
13 manager, who managed the Serna campaign's strategy, hired the media consultant, organized the
14 press and field offices, and supervised the Serna campaign employees and volunteers. Carroll
15 deposition transcript, p. 65. Tom Carroll attended strategy meetings with Eric Serna and a few
16 other key people on the Serna campaign. Serna deposition transcript, pp. 37-39. Tom Carroll
17 served as one of the primary people with whom Eric Serna interacted. Lindsey deposition
18 transcript, p. 79. Tom Carroll worked on developing ads, which they would circulate among the
19 staff for input.

20 **Dukes and Carroll.** Dukes talked with Carroll at least twice a week during the
21 campaign. Dukes deposition transcript, pp. 251-259. They "certainly" talked about the
22 campaign. Dukes deposition transcript, p. 255. "[A]gain, he is a Democrat and we are the
23 Democratic Party. We talk all the time." /d/ They talked about "[t]he campaign. What is going

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1 on. [sic]" Dukes deposition transcript, p. 254. Dukes gave Carroll a copy of the Democratic
2 Party program summary and they went over it. Dukes deposition transcript, pp. 255, 262.
3 Carroll "certainly could have" received all of the Party program summary. "And based on my
4 understanding of the rules and everything, there is no reason for me not to give it to him." Dukes
5 deposition transcript, p. 255. They went over what the Democratic Party was going to do.
6 "Really the purpose of the summary page is to be able to communicate with people that are
7 involved in the election what the Party is doing. I mean, it is talking points." Dukes deposition
8 transcript, p. 256. In a "general way" Dukes talked to Carroll about the program. Dukes
9 deposition transcript, p. 257. Dukes says that Carroll "may have got [sic]" Dukes' "input on
10 general campaign planning aspects," e.g., whether to do an early vote piece on the first day or the
11 day before the election. Dukes deposition transcript, p. 304. "We certainly talked specific Serna
12 stuff but it was just kind of ongoing, the campaign how it is going, what is going on." *Id.* Tom
13 Carroll considered Dukes as helpful on the Serna campaign, especially in field operations, and in
14 devising a field plan for the Serna campaign. Carroll deposition transcript, p. 217.

15 Carroll states that he does not specifically recall the Democratic Party program summary.
16 Carroll deposition transcript, pp. 143-149. As discussed above, however, this Office has
17 established that the Democratic Party program summary was faxed from the Serna campaign's
18 fax number and Dukes also admits discussing this program summary with Carroll. Dukes
19 deposition transcript, pp. 255, 262.

20 **Carroll and Earl Potter, State Party Chairman.** Tom Carroll had regular discussions
21 with Earl Potter, DPNM state party chair regarding party functions during the campaign, and
22 staffing for the GOTV. Carroll deposition transcript, pp. 74-80 Carroll met with Potter,
23 "probably twice a week during the course of the campaign." Carroll deposition transcript, p. 74

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1 Meetings with Potter lasted from 15 to 45 minutes. Carroll deposition transcript, p. 82. Carroll
2 and Potter “would get together and discuss who in which county should be in charge of what. He
3 would talk about what the Party was going to be doing during the campaign, and I would be
4 doing – I would represent the [Serna] campaign. Pretty classic, you know, relationship....”
5 Carroll deposition transcript, p. 75. Carroll updated Potter on things the Serna campaign was
6 doing--the number of volunteers, the amount of money the Serna campaign had raised, the
7 number of signs they would put up, what the Serna campaign was doing and not doing well, and
8 so forth. Carroll deposition transcript, pp. 78-80..

9 Carroll and Potter talked about get-out-the-vote (GOTV) the last two-to-three weeks of
10 the campaign: direct mail, phone banks, vans to take people from senior centers, etc. is what the
11 Party offered. Carroll deposition transcript, p. 85. Carroll says he never discussed the ads run
12 with “soft money” and says he was very careful not to have such discussions. Carroll talked to
13 Earl Potter on a weekly basis about the Native American GOTV, election day GOTV, precinct
14 targeting, etc. Carroll also talked about GOTV needed by the Serna campaign in individual
15 counties, and they discussed GOTV planning. Carroll deposition transcript, pp. 84-88.

16 Carroll asked Potter for help with responses to Republican Party criticisms of Eric Serna.
17 Potter issued press releases in response. See Carroll deposition transcript, pp. 82-83.

18 Carroll acknowledged that an experienced person who knew what that district had spent
19 in prior elections and knew what the opposition was spending would know how to gauge what
20 was needed in the campaign. Carroll deposition transcript, pp. 95-98. Carroll admits that he
21 talked to Earl Potter about how much money the Serna campaign had raised. *Id* Additionally,
22 Carroll recognized that “media is the bulk of any campaign” and that after media, a campaign
23 pays for staff, payroll and signs. Carroll deposition transcript, pp. 92-98 Through the exchange

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1 of such information, Potter and Carroll, both experienced campaign professionals, would know
2 how the campaign was doing financially at different points in the campaign. Given the regular
3 information exchange between the Party and the Serna campaign, the Party and the Serna
4 campaign appeared to have some sort of a gentleman's agreement that certain things would be
5 handled by the Serna campaign and certain things would be taken care of by the Party.

6 **Candidate-specific communications.** Communications between the Party and the Serna
7 campaign were substantial enough to enable the Party to conduct GOTV and other voter-related
8 communications on behalf of Eric Serna during the special election period, thereby achieving
9 maximum benefit from the limited resources of both the Party and the Serna campaign.

10 DPNM documents representing these communications to voters included radio ad scripts,
11 door hangers and ballot applications, all encouraging voters to "Vote Democratic on May 13,
12 1997." These campaign materials are candidate specific in that they state the election date and
13 call upon the reader to vote Democratic. Because there was only one 1997 election in the state of
14 New Mexico, the DPNM thus designed and targeted their communications to persuade voters to
15 vote for Eric Serna. In finding "Reason To Believe" in this matter, the Commission concluded
16 that where only one office is at stake in a special election and where only one member of that
17 party is on the ballot, the communication to vote for that specific party on that election day can
18 refer to no other candidate, i.e., a clearly identified candidate. See Federal Election Commission
19 Factual and Legal Analysis, pp 10-11. The Commission further stated that the disbursements
20 urging the public to vote for such clearly identified candidate "cannot be considered generic voter
21 drive costs." Advisory Opinion Number 1998-9 Eric Serna ran as the only Democratic
22 candidate in the entire state of New Mexico in 1997. No other election and no other candidate
23 existed for which to "vote Democratic "

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1 **Coordination conclusion.** Where only one party candidate runs for public office in a
2 state during an entire calendar year, as in the 1997 New Mexico special election, GOTV
3 activities by that party are candidate-specific. Regular discussions and planning between the
4 party and the candidates as to the timing, location, mode, intended audience, volume of
5 distribution, cost or frequency of placement of these candidate-specific activities constitute
6 coordination. Given the regular communications between the Party and the candidate's
7 committee concerning campaign activities and projected spending, the division of labor in
8 spending and activity by the Party, the overlapping personnel and vendors, and the fact that Eric
9 Serna was his party's only candidate for office during the entire year of 1997, the disbursements
10 made by the Democratic Party during the 1997 campaign period are no different than a direct
11 party contribution to the candidate. Thus, the candidate-specific disbursements of \$202,184.06
12 by the DPNM, resulting from the regular discussions between key persons in the DPNM and the
13 Serna campaign constitute excessive coordinated expenditures in violation of sections
14 441a(a)(2)(A) and 441a(d)(3) of the Act. As previously stated, the DPNM reported coordinated
15 expenditures of \$15,127 on behalf of Eric Serna for the 1997 Special Election, out of a possible
16 \$31,810 pursuant to the coordinated expenditure limits for that office in that election. Thus, the
17 DPNM exceeded coordinated expenditure limits by \$ 185,501.06. Furthermore, failing to report
18 these disbursements as coordinated expenditures constitutes a violation of section 434(b) of the
19 Act.

20 **B. ALLOCATION**

21 **Law.** Disbursements that make up expenditures must be made with funds subject to the
22 limitations and prohibitions of the Act. *See, e.g.*, 2 U.S.C. § 431(9)(A), 11 C.F.R. §§ 109.1(a),
23 114.2(b), 110.4(a)(1), and 115.2(a). Each political committee, including a party committee,

1 which finances political activity in connection with both Federal and non-Federal elections is
2 required to establish a separate Federal account for all disbursements, contributions, expenditures
3 and transfers by the committee in connection with any Federal election, unless it receives only
4 contributions subject to the prohibitions and limitations of the Act. 11 C.F.R. § 102.5(a)(1)(i)
5 and (ii). Except as provided for in 11 C.F.R. § 106.5(g), no transfers may be made to such
6 Federal account from any other account(s) maintained by such committee for the purpose of
7 financing activity in connection with non-Federal elections, and only funds subject to the
8 prohibitions and limitations of the Act shall be deposited in such separate Federal account. *Id.*

9 Corporations and labor organizations may not make contributions “in connection with” a
10 Federal election. 2 U.S.C. § 441b(a). New Mexico state law permits corporate contributions.
11 Thus, an influx of funds from a non-Federal account, such as a state party, into a Federal election
12 in a state that permits corporate contributions would also violate 2 U.S.C. § 441b(a). *See*
13 MUR 4413.

14 Commission regulations set forth specific procedures for party committees in making
15 disbursements in connection with both Federal and non-Federal elections. 11 C.F.R. § 106.5(a).
16 If a party committee has established separate Federal and non-Federal accounts, *see*
17 11 C.F.R. § 102.5, it may allocate these disbursements between these accounts according to
18 various formulas set forth in the regulations. The categories of activity to which allocation
19 applies include, *inter alia*, administrative expenses and expenses for generic voter drive
20 activities. “Administrative expenses” are defined as “including rent, utilities, office supplies, and
21 salaries, except for such expenses directly attributable to a clearly identified candidate ”
22 11 C.F.R. § 106.5(a)(2)(i). “Generic voter drives” are described as “including voter
23 identification, voter registration, and get-out-the-vote (GOTV) drives, or any other activities that

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1 urge the general public to register, vote or support candidates of a particular party or associated
 2 with a particular issue, without mentioning a specific candidate.” 11 C.F.R. § 106.5(a)(2)(iv).
 3 The Act defines “clearly identified” as meaning “(A) the name of the candidate involved appears,
 4 (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is
 5 apparent by unambiguous reference.” 2 U.S.C. § 431(18). Commission regulations further
 6 define “clearly identified” as

7 The candidate’s name, nickname, photograph, or drawing appears or the identity of the
 8 candidate is otherwise apparent through an unambiguous reference such as “the
 9 President,” “your Congressman,” or “the incumbent,” or through an unambiguous
 10 reference to his or her status as a candidate such as “the Democratic presidential
 11 nominee” or “the Republican candidate for the Senate in the State of Georgia.”
 12 11 C.F.R. § 100.17.

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 14 Accordingly, candidate-specific activity, such as that pertaining to a clearly identified or specific
 15 candidate, does not constitute generic voter activity and is not allocable under Section 106.5.
 16 Such candidate-specific disbursements, if made in support of a Federal candidate, constitute
 17 “contributions” to or “expenditures” on behalf of that candidate and would be subject to the
 18 limitations and prohibitions under the Act, including the requirement that these disbursements be
 19 made with funds obtained exclusively from the Party’s Federal account.

20 **Analysis -Voter Drive and Get-out-the-vote (GOTV) expenses.** Disbursements for
 21 communications urging the public to vote for a clearly identified candidate cannot comprise
 22 generic voter drive costs and are therefore not included within the Commission’s allocation
 23 regulations. 11 C.F.R. § 106.5. Through discovery, this Office obtained direct mail pieces,
 24 absentee voter application packages, flyers, door hangers, radio ad and phone bank scripts all
 25 urging the public to “vote Democratic on May 13, 1997,” a special election exclusively for the 3rd
 26 Congressional District in New Mexico, and the only election for office in the entire state that

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year. In this context, the words "vote Democratic on May 13, 1997" can mean no other candidate than Eric Serna and therefore meet the definition of 11 C.F.R. § 100.22(a) and constitute express advocacy of a clearly identified candidate.

Of the total in the chart on pp. 2-3 of this Brief, \$173,878.29 of these disbursements were from non-Federal sources. By allocating 86% non-Federal expenses that are directly attributable to a clearly identified candidate, respondent has violated 11 C.F.R. § 102.5(a)(1)(i).

Furthermore, since New Mexico state law permits corporate contributions, Respondents have also violated 2 U.S.C. § 441b(a) by allocating non-Federal funds into a Federal election.

III. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find probable cause to believe that the Democratic Party of New Mexico-Federal and Judy Baker, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a)(2)(A), 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i).

2. Find probable cause to believe that the Democratic Party of New Mexico-Non-Federal (State) and Judy Baker, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).

1/29/02
Date

Lawrence H. Norton
Lawrence H. Norton
General Counsel

Staff assigned: Margaret J. Toalson

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